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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In Re: FRANK J. VONDERSAAR,
Petitioner.

Petition for Writ of Mandamus to United States District Court for the Southern District of Ohio Western Division

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has satisfied the burden of showing extraordinary cause warranting the issuance of a writ of mandamus?

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 26. Considerations governing issuance of extraordinary writs

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that ade-

quate relief cannot be had in any other form or from any other court.

RESPONSE TO PRAYER

Respondent, Michal Varner, respectfully requests that the Court deny Petitioner's prayer for writ of mandamus to the United States District Court for the Southern District of Ohio, Western Division, on the grounds that pursuant to Supreme Court Rule 26 there exist no exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief is available to Petitioner in another forum. For the following reasons, Petitioner's prayer for writ of mandamus is not well-taken and this Court should deny same.

STATEMENT OF THE CASE

On June 2, 1988, Petitioner filed his complaint in the United States District Court for the Southern District of Ohio in Dayton, Ohio, style of the case *Vondersaar* v. *Edwin Meese, III, et al.*, Case No. C-3-88-269. Petitioner alleged, *inter alia*, a conspiracy between Respondent Michal Varner and other co-defendants to deprive Petitioner of his civil rights and to obstruct justice in the conduct of a judicial proceeding. Specifically, Petitioner complains of a visitation order recommended by Michal Varner as referee of the Greene County, Ohio, Court of Common Pleas.

On November 2, 1988, Petitioner filed a motion for preliminary injunction requesting, *inter alia*, that the district court grant visitation rights with his daughter. (Docket No. 39).

In its decision filed November 18, 1988, the Court raised a number of serious subject matter jurisdictional questions *sua sponte* and ordered Petitioner to file a brief on several jurisdictional questions before ruling on any pending motions. (Docket No. 45). Ignoring the Court's order, Petitioner filed a

motion requesting an immediate ruling on his motion for preliminary injunction. (Docket No. 46). The Court denied Petitioner's request for an expedited disposition of his motion for preliminary injunction prior to Petitioner's compliance with the Court's order for briefing (Docket No. 53).

On December 12, 1988, Petitioner filed his notice of appeal to the United States Court of Appeals for the Sixth Circuit (Case No. 88-4175), on the grounds that the District Court's refusal to rule on Petitioner's motion for preliminary injunction in a "timely manner" constituted a "de facto" denial of the preliminary injunction. (Docket No. 58).

In conjunction with the notice of appeal, Petitioner moved the Court of Appeals for a preliminary injunction requesting, as before, visitation rights with his daughter. Twenty-two days later, Petitioner requested an immediate ruling on his motion for preliminary injunction.

Following dismissal by the Court of Appeals for want of jurisdiction, Petitioner moved to amend his appeal and requested a writ of mandamus directing the trial judge to rule on his motion for preliminary injunction. Petitioner's motion to reconsider was denied on March 21, 1989.

Petitioner requests this Court to issue a writ of mandamus directing the trial judge to immediately rule on Petitioner's motion for preliminary injunction filed November 2, 1988.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES WARRANTING THE ISSUANCE OF A WRIT OF MANDAMUS.

Petitioner contends that the District Court's refusal to rule on his motion for preliminary injunction for over four months deprived him of his constitutional right to due process of law and a timely dispensation of justice. Petitioner seeks a writ of mandamus from this Court, pursuant to 28 U.S.C. § 1651(a), directing the trial judge to immediately rule on his motion for preliminary injunction.

This Court has recognized that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. A party seeking issuance of the writ must show that he has no other adequate means to obtain relief, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1945); and that he satisfies the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953), quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

The issuance of a writ of mandamus is not a matter of right, but of the Court's discretionary power. Supreme Court Rule 26 provides in pertinent part:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown . . ., that *there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.*" (emphasis added.)

Petitioner has violated the letter and spirit of Rule 26, failing to demonstrate the existence of any extraordinary cir-

cumstances justifying the issuance of the writ. *In Re McDonald*, 109 S.Ct. 993 (1989).

As noted in the foregoing Statement of Facts, the district court, in its decision of November 18, 1988, raised several serious subject matter jurisdictional questions *sua sponte* and ordered Petitioner to file a brief regarding same. To this date, Petitioner has failed to follow the district court's order for briefing. Instead, Petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit, arguing that the district court's refusal to immediately rule on his motion for preliminary injunction constituted a "de facto" denial of that relief, giving rise to appellate jurisdiction. The Sixth Circuit dismissed the appeal for want of jurisdiction, noting that no authority, statutory or otherwise, supported Petitioner's proposition.

Petitioner moved to amend his appeal to request a writ of mandamus commanding the trial judge to rule on his motion for preliminary injunction. Petitioner is clearly not entitled to such extraordinary relief from the Sixth Circuit, and likewise, from this Honorable Court, because the district court "is presently engaged in the prompt disposition of his request for injunctive relief." (Petitioner's Appendix p. A7).

Federal courts are courts of limited jurisdiction and are under a duty *sua sponte* to examine the existence of subject matter jurisdiction in every case, even if not raised by the parties. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908). Such action was taken by the district court in its order filed November 18, 1988. The court afforded Petitioner the opportunity to brief those issues before rendering any decision. Petitioner's failure to brief those issues is the reason behind any delay in the district court's disposition of his request for injunctive relief.

This Court has held that only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Petitioner has failed to show

that the district court's order of briefing was an abuse of discretion; certainly he has not shown that his right to relief from this order is clear and indisputable. Clearly, the discretionary act of ordering Petitioner to show why his complaint should not be dismissed on jurisdictional grounds does not rise to the level of judicial usurpation of power justifying the extraordinary relief of mandamus.

It is respectfully submitted, therefore, that Petitioner's prayer for writ of mandamus is not well-taken and should be dismissed.

II. ADEQUATE RELIEF IS AVAILABLE TO PETITIONER IN ANOTHER FORUM, PRECLUDING THE ISSUANCE OF THE WRIT.

The record indicates that the district court suspended a ruling on Petitioner's motion for preliminary injunction due to the serious doubt as to subject matter jurisdiction. Petitioner complains of a visitation order recommended by Respondent, Michal Varner, in her capacity as Referee for the Greene County, Ohio, Court of Common Pleas, temporarily terminating Petitioner's visitation rights with his daughter. It is evident that he seeks relief from this order in the form of visitation rights.

Respondent concurs with the District Court Magistrate (Docket No. 65) that federal district courts have no jurisdiction to review decisions of state trial courts. *Dist. Col. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). Petitioner's remedy would have been to appeal to the Ohio Court of Appeals, Second District, and ultimately to the Ohio Supreme Court.

Furthermore, Petitioner requests the district court to exercise domestic relations powers by awarding him visitation rights with his daughter. Respondent further agrees with the District Court Magistrate (Docket No. 65) that federal courts have uniformly refused to exercise domestic relations powers,

even when an independent basis for jurisdiction exists, e.g., diversity jurisdiction or pendent jurisdiction. *See Barber* v. *Barber*, 21 How. 582 (U.S. 1859); *Thompson* v. *Thompson*, 108 S.Ct. 513 (1988). Petitioner's protestations to the contrary, the district court lacks the jurisdiction necessary to exercise domestic relations powers.

Petitioner's contention that the relief sought is not available in any other court is simply untrue. As noted above, Petitioner's proper remedy lies in an appeal with the state court. Even if the Court should find an abuse of discretion on the part of the district court, Petitioner can obtain adequate relief by filing an appeal with the state court. Therefore, pursuant to Supreme Court Rule 26 Petitioner's prayer for writ of mandamus should be denied.

CONCLUSION

For the reasons set forth above, Respondent requests that this Court dismiss Petitioner's prayer for writ of mandamus directed to the United Sates District Court for the Southern District of Ohio, Western Division at Dayton.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Civil Action No. C-3-88-269
Judge Weber
Magistrate Merz

FRANK J. VONDERSAAR,

Plaintiff,

vs.

EDWIN MEESE, III, et al.,

Defendants.

DECISION AND ENTY ON PENDING MOTIONS
ORDER FOR BRIEFING
(Filed November 18, 1988)

This case is before the Court upon a number of pending motions, all of which are ruled upon as follows:

1. Plaintiff's Amended Motion to Disclose Applications and Orders for Electronic Surveillance (Doc. #23) is DENIED on the same grounds set forth in District Judge Rice's prior Decision and Entry (Doc. #15) denying the original application. The Magistrate finds that the Amended Motion adds nothing material to the original application. Plaintiff asserts that the Court can infer from Defendants' memorandum in opposition to disclosure that there is in fact something to be shielded from disclosure. Plaintiff has employed the logical construct of the negative pregnant, but it is in this case a fruitless conception. The Magistrate finds, as did Judge Rice, that the

relevant Defendants have unequivocally denied that Plaintiff has been the target of any electronic surveillance.

2. Plaintiff's Motions to Compel Answers to Interrogatories from the Department of Defense (Doc. #19), Edwin Meese, III (Doc. #20), and the Department of Justice (Doc. #21) are DENIED for a number of reasons. First of all, the Departments of Justice and Defense are not defendants in this action. Plaintiff's assertion (Doc. #43) that somehow they have become parties by equitable estoppel or by the use of their names in the caption of a pleading filed by the United States Attorney betrays a lack of basic understanding of civil procedure. Entities (assuming they are *sui juris*, a doubtful matter as to these two entities) become defendants by being named in a complaint and served with process, neither of which has occurred in this case as to the Department of Defense or Justice.

Secondly, the motions to compel were filed in violation of S.D. Ohio R. 4.3.3. and 4.3.4. Plaintiff's assertion that he need not consult with Mr. Quinn before filing such a motion because Mr. Quinn is merely an agent of a "fascist administration" misreads S.D. Ohio R. 4.3.3 and 4.3.4 which contain no exceptions based on the belief of a moving party that the opposing counsel represents a "fascist administration."

3. Plaintiff's Motion to Compel Defendant William Barney, III, to respond further to interrogatories (Doc. #24) is DENIED in that it also was filed in violation of S.D. Ohio R. 4.3.3 and 4.3.4.

4. Plaintiff's Motion to Compel Defendant Michal Varner to respond to interrogatories is MOOT in that the apparent deficiencies in the response have been dealt with by Defendant Varner's Response (Doc. #34).

5. The Motions of Defendants Michal Varner (Doc. #36) and Judson Shattuck (Doc. #38) for protective orders and the responsive Motion to Compel of Plaintiff (Doc. #37) are all DENIED. None are accompanied by the affidavit required

by S.D. Ohio R. 4.3.4 showing compliance with S.D. Ohio R. 4.3.3. However, the Magistrate notes that Referee Varner's and Judge Shattuck's response that they are not the custodians of the file sought are sufficient responses under Fed. R. Civ. P. 34 to any request to them to produce the file in question. The proper custodian is, as Plaintiff knows, the Clerk of Courts of Greene County.

6. Plaintiff's Motion to Compel (Doc. #40) the Justice Department and Defense Department to furnish the last known addresses of Edwin Meese, III, and Caspar Weinberger is DENIED for the reason set forth above that these entities are not properly subject to interrogatories under Fed. R. Civ. P. 33 because they are not parties in this action. The Magistrate also notes that this motion was filed without compliance with S.D. Ohio R. 4.3.4.

ORDER FOR BRIEFING

The Complaint in this case raises a number of serious subject matter jurisdiction questions. This Court is under a duty to raise such questions *sua sponte*, even if not raised by the parties. *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908). The Court believes the parties should have an opportunity to brief these issues before any decision.

Accordingly, it is hereby ORDERED that Plaintiff shall file a brief on the following issues not later than December 15, 1988:

1. Why is not the Plaintiff's claim for reinstatement in the Air Force barred by the doctine of exhaustion of administrative remedies in that Plaintiff has not demonstrated to the Court that he has applied for relief to the Air Force Board for the Correction of Military Records?

2. Has Plaintiff exhausted his administrative remedies regarding his FAA medical certificate? At one point in this litigation, the United States Attorney claimed that Plaintiff had then pending a new application for such a certificate which had not been ruled upon and that he had defaulted by

failing to appear for an administrative law judge hearing on a prior application.

3. To the extent Plaintiff seeks relief in the nature of custody of his child or visitation rights with her, why is not this claim jurisdictionally barred by the long-standing policy of the United States courts to refuse to exercise domestic relations jurisdiction? *See, Barber* v. *Barber*, 21 How. 582 (U.S. 1859); *Thompson* v. *Thompson*, 108 S. Ct. 513 (1988).

4. To the extent this action asks this Court to review and revise in some way a decision of the Greene County Common Pleas Court, why is not jurisdiction barred by the doctrine of *Dist. Col. Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)?

Defendants herein may file responsive briefs on these questions and any other jurisdictional matters raised by Plaintiff's brief or by the case not later than January 16, 1989.

Additionally, the Magistrate notes that Judge Shattuck and Referee Varner are entitled to have their immunity defenses determined prior to discovery. *Poe* v. *Haydon*, 853 F. 2d 418 (6th Cir. 1988). Accordingly, all further discovery against said Defendants is stayed pending resolution of the immunity defense. Counsel for said Defendants are ordered to file motions for summary judgment directed to the immunity defense not later than December 15, 1988, to which Plaintiff shall respond within the time allowed by S.D. Ohio 4.0.2.

/s/ MICHAEL R. MERZ
UNITED STATES MAGISTRATE

November 18, 1988.